

**THE EXCLUSIVITY RESTRICTION IS NOT “NECESSARY”  
TO PRESERVE COMPETITION IN THE MARKET  
FOR VIDEO PROGRAMMING DISTRIBUTION**

Congress directed that the exclusivity restriction in the program access rules be eliminated after ten years, unless the Commission finds that it “continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.”

In both its initial and reply comments before the Federal Communications Commission, Cablevision offered considerable empirical and econometric data demonstrating that the exclusivity restriction is not necessary to preserve or protect competition among multichannel video programming distributors (MVPDs). Newly-compiled factual data attached to this submission, showing the growth of DBS in the New York marketplace despite the availability of Cablevision’s exclusive Metro service, belie claims that the restriction is necessary to ensure a competitive video programming distribution marketplace.

While Cablevision and other advocates of sunseting the rule have offered concrete evidence that belies assertions regarding the necessity of retaining the exclusivity ban, proponents of the restriction have offered little more than speculation and anecdote in support of their position. Attached to this submission is a paper submitted by Economists, Inc. which details the type of data and econometric analysis that would need to be undertaken in order to assess the necessity of retaining the exclusivity restriction. The proponents of the ban have utterly failed to engage in the type of data compilation and analysis requisite to showing the necessity for the continued imposition of the exclusivity restriction.

The exclusivity restriction cannot be retained based upon a view that it is “desirable” or “beneficial” or enhances the competitive prospects of some alternative MVPDs. Rather, the restriction can be retained only if its continued imposition is necessary to preserve and protection competition in video programming distribution. The record in this proceeding fails to satisfy this standard.

The recent *Fox* and *United States Telephone Assn.* decisions by U.S. Court of Appeals highlight the considerable evidentiary burden required to satisfy a “necessary” standard. The conjectural claims by proponents of the exclusivity ban, who bear the burden of demonstrating that re-imposition of the exclusivity ban is necessary to prevent competitive harm, are insufficient in the face of the heavy burden imposed by section 628(c)(5).

**DBS Subscriber Growth Rebuts Claims that the Exclusivity Restriction Is “Necessary” to Preserve and Protection Competition**

The “macro” marketplace facts and economic evidence presented in Cablevision’s initial and reply comments underscore the competitiveness of the video programming distribution market and the abundance of programming content available from non-cable sources.<sup>1/</sup> Specific

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<sup>1/</sup> In particular, Cablevision’s comments noted that

data on the New York market, attached hereto, provides further evidence that reimposition of the exclusivity restriction is not necessary to protect competition and must therefore be eliminated.

As the Commission is aware, Cablevision's affiliated programming service, Metro, is offered in the NYMA region to cable operators on an exclusive basis.<sup>2/</sup> Metro is a terrestrially-delivered local programming service designed to serve as an electronic newspaper for viewers in the NYMA region. Metro's content has included local information and entertainment programming, traffic and weather, and live sports and cultural events programming.

Competing MVPDs such as DirecTV, EchoStar, and RCN have complained that their inability to provide their subscribers with the local professional sports programming featured on the exclusive Metro service has hampered their ability to compete in the NYMA region,<sup>3/</sup> but the facts simply do not support this assertion. To the contrary, marketplace data demonstrate that -- notwithstanding the launch of Metro -- DBS subscriber growth in the NYMA has continued to rise at a steady, uninterrupted pace.

In August 1998, when the Metro service was launched to 1 million cable subscribers, DBS providers served approximately 150,000 in the NYMA region. By March, 2002, Metro

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- Non-cable MVPDs now serve over 20% of the video programming marketplace, and offer a competitive choice in every local market served by cable; DBS operators have outpaced cable operators with respect to signing up new customers for the last five consecutive years;
  - The two largest DBS operators are now the third and sixth largest MVPDs in the nation; EchoStar and DirecTV have considerable financial resources and substantial marketplace clout, and thereby have ample ability to develop and market their own programming services;
  - New terrestrially-based competitors have emerged, offering service to millions of homes in local metro markets all around the country;
  - The total number of cable programming networks has nearly quadrupled, and the number of programming services offered nationally that have no cable ownership has increased from 45 to over 200; and
  - The percentage of vertically-integrated national programming services has fallen substantially, and the number of vertically-integrated networks among the top 15 most watched cable programming services has dropped by more than 50 percent.
  - Exclusivity is typically a pro-competitive strategy and is a common business tool in the media and entertainment marketplace. Where exclusivity poses a threat to competition, antitrust law provides an adequate and efficient remedy.

*In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act*, CS Docket No. 01-290, Cablevision Comments at 19-39; Cablevision Reply Comments at 2, 9-17.

<sup>2/</sup> See *RCN Telecom Services of New York, Inc. v. Cablevision Systems, Inc. et al.*, 14 FCC Rcd 17093 (1999), *aff'd*, 16 FCC Rcd 12048 (2001).

<sup>3/</sup> See e.g. *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act*, CS Docket No. 01-290, Comments of EchoStar at 5, 18-19; Reply Comments of DirecTV, Inc. at 8 & n. 26; Comments of RCN Corp., at 15-18.

reached over 4.3 million viewers in the NYMA region, DBS subscriber ship had grown to over 600,000 customers in the same area. DBS penetration in the NYMA region has quadrupled in roughly three and one-half years, even as Metro's subscribership has grown. As the attached Table 1 graphically illustrates, competition from DBS has risen at an unbroken pace since the date of Metro's launch, and has even accelerated since Metro's subscribership achieved its current 4.3 million level in October, 1999. Significantly, DBS growth has continued without regard to the number of sporting events carried on Metro.

Moreover – and directly at odds with the unsubstantiated but vigorously asserted claims of the proponents of the ban – the exclusive distribution of professional sports programming on Metro Channels, ranging from a few to nearly 20 professional games each month, as had *no* discernable impact on the penetration and growth of DBS. Indeed, changes in exclusive sports programming on Metro demonstrate no seasonal changes in DBS growth, and longer-term, despite the persistence of exclusive programming on Metro Channels, DBS penetration has grown at an accelerating pace. If exclusive sports on Metro really harmed the competitive position of rival MVPDs in the NYMA region, then one would expect the rate of DBS incremental subscriber growth to be lower during periods when a relatively high number of exclusive games are featured on Metro. In fact, this has not proven to be the case.

The NYMA-region data presented above are consistent with Cablevision's initial and reply comments: competitors such as DirecTV and EchoStar are formidable rivals that can assemble strong, competitive video programming packages without the need for government intervention or assistance.

**The Proponents of the Ban Have Failed to Meet the Heavy Burden of Proof Imposed by the "Necessary" Standard**

The Cable Act specifies that the Commission may only re-impose the exclusivity restriction if it "*continues to be necessary* to preserve and protect competition and diversity in the distribution of video programming" (emphasis added).

The standard imposed by section 628(c)(5) imposes a heavy burden of proof upon those who favor continuing the restriction. The exclusivity ban cannot be retained based upon a finding that it is beneficial or desirable, or that the restriction enhances the competitive prospects of particular MVPDs. Had Congress intended such a showing to suffice, it could have adopted a "public interest" standard or some alternative formulation that offered the Commission greater discretion.

Instead, however, the standard imposed by Congress means that the exclusivity restriction *must* sunset unless its supporters can affirmatively demonstrate that the preservation of competition in the video programming distribution market necessitates re-imposition of the restriction. They have failed to do so.

Attached to this submission is a paper from Economists, Inc. outlining the type of economic data and analysis that would have to be gathered and examined by proponents of the restriction in order to meet their burden of demonstrating that the ban is necessary to preserve

competition in the video programming distribution marketplace.<sup>4/</sup> Economists, Inc. concludes that, based upon the record before the Commission, “there is no economic basis upon which the Commission could rationally conclude that the current rule is not harmful to consumers, much less ‘necessary’ to ensure continued consumer benefits.”<sup>5/</sup>

Two recent cases from the D.C. Circuit Court of Appeals underscore the significant evidentiary burden imposed upon proponents of the restriction by the “necessary” standard. In *Fox Television Stations, Inc. v. FCC*,<sup>6/</sup> the D.C. Circuit Court of Appeals held that a statutory directive to retain a rule only if it is “necessary” imposes a “presumption in favor of” modification or repeal. The court also found that compliance with a statutorily-imposed “necessary” standard requires an “affirmative justification” for retention of a rule,<sup>7/</sup> and cannot be met merely by showing that the rule “‘continues to serve the public interest.’”<sup>8/</sup>

In *United States Telecom Assn. v. FCC*,<sup>9/</sup> the D.C. Circuit rejected the notion that a Commission view that an unbundling requirement “is better” than not sufficed to meet the “impairment” prong of the “necessary and impair” test imposed by Congress to determine which network elements must be unbundled.<sup>10/</sup> Significantly, the Commission already had acknowledged that the “necessary” prong of this test imposed an even more stringent evidentiary showing than the impairment test considered in *USTA*<sup>11/</sup>

In view of the heavy burden of proof imposed by Congress’s choice of the “necessary” standard in section 628(c)(5), mere assertions that the exclusivity restriction benefits rival MVPDs do not suffice to justify retention of the ban. The “necessary” standard precludes resting a decision to retain the exclusivity restriction on a view that the ban “helps” competition or deters potential harmful conduct. Indeed, since, even after a sunset, the antitrust laws would continue to function as a backstop against anti-competitive exclusivity arrangements, it is difficult to predicate a continuation of the restriction on the need to deter potential abuses.

In particular, neither DirecTV nor EchoStar no longer need the assistance of the exclusivity ban. With a total of 17 million DBS customers, combined revenues of almost \$25 billion, they are respectively the third and fifth largest MVPDs in the country; their size makes them critical to any programmer. DirecTV and EchoStar have ready access to capital, substantial market capitalization,

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<sup>4/</sup> “Economic Evidence and Section 628(c)(2)(D),” Economists Incorporated, June 1, 2002.

<sup>5/</sup> *Id.* at 2.

<sup>6/</sup> 280 F.3d 1027, 1048 (D.C. Cir. 2002), *petition for rehearing pending* (“*Fox Television Stations*”).

<sup>7/</sup> *Id.*

<sup>8/</sup> *Id.* at 1050 (internal citation omitted).

<sup>9/</sup> 2002 U.S. App. Lexis 9834, (May 24, 2002) (“*USTA*”).

<sup>10/</sup> *Id.* at \*28.

<sup>11/</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 31 (1999) (“We agree . . . that the ‘necessary’ standard of section 251(d)(2)(A) is a higher standard that applies to proprietary network elements” than the impairment standard), *rev’d and remanded on other grounds sub nom. United States Telephone Assn. v. FCC*, \_\_\_ F.3d \_\_\_ (D.C. Cir. 2002).

attractive subscriber bases, phenomenal growth rates, and can command access to programming – including DBS-only exclusive programming such as NFL Sunday Ticket<sup>®</sup> -- that exceed the size, reach, and command of most cable operators.<sup>12/</sup> By the satellite industry's own estimates, DBS gains over 8,000 subscribers per day and had an annual subscriber growth rate of 31 percent in 2000, which is more than 20 times the annual growth rate for cable television in 2000. For the last five consecutive years, DBS providers have outpaced cable operators with respect to signing up new customers. Meanwhile, cable's market share continues to decline on an annual basis.<sup>13/</sup>

Indeed, EchoStar and DirecTV have achieved a level of market penetration that exceeds the subscribership enjoyed by cable companies considered dominant by Congress in 1992. Then, the Senate Commerce Committee expressed concerns that the top five distributors of cable programming could exercise monopsony power.<sup>14/</sup> DirecTV is currently the number three MVPD in the country with 10 million subscribers, and EchoStar has just surpassed the 7 million subscriber level, and moved into the number five MVPD spot, ahead of Charter.<sup>15/</sup> Both EchoStar and DirecTV have more subscribers than four of the five "large MSOs" mentioned in the Senate Report, and they both control a greater share of the marketplace than did three of the top five distributors when the 1992 Act was enacted.<sup>16/</sup>

Measured against 1992's yardstick (as required by the statutory directive to ascertain whether the exclusivity ban "*continues* to be necessary") and as demonstrated by contemporary market-specific data, there is no evidence to suggest that exclusive arrangements hamper the ability of DBS distributors to compete and attract new customers. The "necessary" standard obligates proponents of the exclusivity restriction to demonstrate that exclusive arrangements will imperil today's competitive marketplace for the distribution of video programming, but, as the data above shows, programming exclusivity does not harm competition or consumer welfare. It is particularly unfounded to suggest that the preservation of competition in video distribution requires hobbling companies such as Cablevision – which is half the size of EchoStar and has only one-third as many subscribers as DirecTV – with restrictions on exclusive arrangements that are not imposed on its much-larger rivals.

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<sup>12/</sup> See Cablevision Comments at 15-18, 29-31, 35-37.

<sup>13/</sup> *Id.*

<sup>14/</sup> S. Rep. No. 102-92, 102d Cong., 1<sup>st</sup> Sess. (1991) at 32-33 ("Senate Report").

<sup>15/</sup> See [http://www.skyreport.com/dth\\_counts.htm](http://www.skyreport.com/dth_counts.htm); [http://www.ncta.com/industry\\_overview/top50mso.cfm](http://www.ncta.com/industry_overview/top50mso.cfm)

<sup>16/</sup> Senate Report at 32-33. See also "Cable Television," Hearings before the Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives, 100<sup>th</sup> Cong., 2d Sess., May 11 1988, testimony of Jack Valenti, Motion Picture Association of America, at 397 (quoting statement from Century Cable's Leonard Tow that "the top ten buyers in the United States enjoy much better prices than the other cable operators"); *id.* at 367 (noting the "rude truth" of the power of the top 5 distributors and citing table showing the number 5 distributor, Cox, had 3.22% of the nation's cable subscribers, or 1.4 million subscribers, number 4 Comcast had just over 2 million subscribers and a 4.67% share of the market nationally, and number 3 Continental had 2.3 million subscribers and 5.22% of the market).